is objectionable as inexpedient when applied to changes to an exempt class; and in any event it is quite a stretch of the language of the statute. (3) Under early bankruptcy statutes exempting non-traders, the courts held a debtor to be non-exempt if he was in a non-exempt class at any time, either when he incurred [9] or while he owed [10] the petitioning creditor's debt. Under our present statute, there are some *dicta* adopting this harsh [11] test; [12] but the decisions do not go beyond the holding in a recent case: that where the debtor incurs debts while non-exempt, and then changes to an exempt class before the act of bankruptcy, his character is to be determined as of the time of incurring the debts and acquiring the assets scheduled.[13] *Re Burgin*, 173 Fed. 726 (Dist. Ct., N. D. Ala.). On the other hand no decision has held a debtor exempt merely because his debts were largely incurred while he was in an exempt class.[14]

The composite result of the various tests seems to be, that where the debtor is in the non-exempt class at the date of the petition, he is amenable; [15] with a possible reservation where the change was subsequent to the act of bankruptcy [16] and, perhaps, to the incurring of the greater part of the debts.[17] But where the debtor is in the exempt class at the date of the petition, the courts have refused to allow the exemption, unless he was in that class at the date of the act of bankruptcy,[18] and probably also a reasonable time prior thereto.

RELEASE OF SPECIAL POWERS IN GROSS. — A fine or recovery "ransacks the estates" of those joining in it and puts a tortious fee in the transferee.[1] The general doctrine that such a conveyance destroys a power in the grantor has been law for centuries.[2] But for almost as long a period it has been matter of controversy whether and how far a power in the holder of a particular estate to appoint a remainder to a class falls within this doctrine. An early leading case [3] laid down the sweeping proposition that a tortious conveyance extinguishes all powers appurtenant or in gross. From opposite sides two eminent text-writers struck at this result: Powel [4] denied

[9] *England:* Heylor *v.* Hall, Palmer 325; Doe *v.* Lawrence, 2 Car. & P. 134; *Re* Dagnall, 1896, 2 Q. B. 407. *United States:* See under Act of 1841, Baldwin *v.* Rosseau, Fed. Cas. 803. *Cf.* under Act of 1867, Davis *v.* Armstrong, Fed. Cas. 3, 624.

[10] Butcher *v.* Easto, *supra.*

[11] The early bankruptcy acts were quasi-criminal. See 1 Peake 91, n.

[12] Tiffany *v.* La Plume Condensed Milk Co., *supra.*

[13] Cf. Baldwin *v.* Rosseau, *supra.* The cases holding amenable corporations which have ceased all active business may be explained on this ground. *Re* C. Moench & Sons Co., 130 Fed. 685.

[14] Hoffschlaeger Co. *v.* Young Nap, 12 Am. B. R. 521, contains a *dictum* the other way. See also cases cited in notes 16 and 17, *ante.*

[15] *Re* Matson, 123 Fed. 743.

[16] Flickinger *v.* First Nat'l Bank, 145 Fed. 162. See Olive *v.* Armour & Co., 167 Fed. 517; Tiffany *v.* La Plume Condensed Milk Co., *supra.*

[17] See *Re* Luckhardt, 101 Fed. 807. But see Tiffany *v.* La Plume Condensed Milk Co., *supra.*

[18] See *Re* Pilger, 118 Fed. 206; *Re* Luckhardt, *supra.*

[1] 1 CRUISE, FINES, 3 ed., § 300; 2 *ibid.* § 234.

[2] Digges's Case, Moore Cas. 603.

[3] Edwards *v.* Sleater, Hard. 410, 416.

[4] POWEL, POWERS, 9, 32.

such interests to be in gross, and accordingly put them without the rule; Preston [5] accepted them as powers in gross, but insisted that they formed an exception to the rule. Powell's classification of powers was unsupported by authority then,[6] and has been neglected since; but the view of Preston, that one having no interest in a power beyond the function of exercising it may not release, seems to have been the view of at least one English judge.[7]

The case that almost a century ago founded the modern English law on the releasability of special powers in gross [8] did not squarely raise the point, as both conveyance and appointment were to the same person. And the court, while holding for an extinguishment on the ground that a grantor may not derogate from his grant, explicitly refrained from declaring as a positive rule of law that every power in gross may be released. This step was, however, taken in a direct decision [9] by the same court in the following year. And, thus established, the rule was shortly thereafter held to cover a case where the power was testamentary.[10]

The doctrine was so firmly supported by these cases that it managed to survive the passage of the act abolishing fines and recoveries,[11] which removed its technical foundation. And it was not long before a special power in gross over personalty was deemed releasable, and a contract against its exercise recognized as giving in common to the takers in default of appointment an equitable interest good against an appointee.[12] The principle found extreme expression in the holding [13] that a contract not so to exercise the power as to reduce the particular share of the covenantee below a certain amount, gives to the covenantee an equitable interest to that amount. Yet affirmative agreements to exercise a special testamentary power in a particular way are regarded as so far hampering the performance of a fiduciary function as to be for all purposes void.[14] That such of these inconsistent holdings as give effect to the negative agreements are anomalous, is the *dictum* of a leading case; [15] and that they are unfortunate is conceded by a recent decision which accepts them as binding. *In re Evered*, 54 Sol. J. 83 (Eng. Ch. D., Nov. 8, 1909).

Only a minority of the cases [16] in this country have gone the full length of the English authorities. One decision [17] accepts the rule that powers in gross are releasable while powers simply collateral are not, but argues that an authority in the holder of a particular estate to appoint a remainder to a class is simply collateral,[18] unless the relationship of children and parent

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[5] 2 PRESTON, ABSTRACTS, 2 ed., 261.

[6] Thomlinson *v.* Dighton, 1 Salk. 239, relied on by the author, classifies such interests as "collateral" — a term frequently sued as synonymous with "in gross" and differentiated from "simply collateral." See 22 HARV. L. REV. 444.

[7] Jesson *v.* Wright, 2 Bligh 1, 15.

[8] West *v.* Berney, 1 Russ. & M. 431.

[9] Smith *v.* Death, 5 Madd. 371.

[10] Horner *v.* Swann, 1 T. & R. 430.

[11] 3 & 4 WILL. IV. c. 74.

[12] Walford *v.* Gray, 11 Jur. N. S. 473.

[13] Davies *v.* Huguenin, 1 Hem. & M. 730.

[14] *In re* Bradshaw, [1902], 1 Ch. 436, discussed in 15 HARV. L. REV. 862.

[15] Coffin *v.* Cooper, 2 Dr. & Sm. 365.

[16] Thorington *v.* Thorington, 82 Ala. 489; Grosvenor *v.* Bowen, 15 R. I. 549.

[17] Thomson's Executors *v.* Norris, 20 N. J. Eq. 489, 524.

[18] This refinement upon Powel's view is as unsupported as that authority's broader expression. See note 6, *ante*.

subsists between the class of appointees and the donee. Another opinion,[19] carefully reasoned, follows the English classification of powers, but excepts from the rule powers in gross where there is no gift over in default of appointment. A third jurisdiction early held the doctrine with strictness to its technical foundation in the law of tortious conveyances;[20] a fourth, almost without argument, rejected it altogether.[21] And now that its result is disapproved at home, it is not to be supposed that a mediæval theory, resting upon the historical quality of methods of conveyancing abolished in the land where they originated, will maintain itself in jurisdictions[22] where those methods never were known or long ago became obsolete.

LIABILITY OF AN ANOMALOUS INDORSER AT COMMON LAW AND UNDER THE NEGOTIABLE INSTRUMENTS LAW. — The precise nature of the obligation of one whose signature appears on the back of a bill or note before that of the payee has been always a subject of hopeless conflict at the common law. On the continent such an anomalous indorser is known as an *aval*, and is held liable to all subsequent parties as surety for that person to facilitate whose transfer the *aval* was given.[1] Most of the decisions under the common law agree that the extent of the liability depends wholly upon the intention of the parties; and various presumptions are resorted to for determining that intention. There are at least four distinct rules.

Such a signature is not an indorsement in appearance, since it precedes that of the payee, and therefore is not a link in the chain of title. Nor is it an acceptance, for only a drawee or one accepting for the honor of the maker can be an acceptor.[2] Hence many courts conclude that such an indorser should be presumed to have signed as co-maker.[3] It is so held in a recent case. *Barden* v. *Hornthal*, 65 S. E. 513 (N. C.). Other courts declare the anomalous indorser to be presumably a surety for the maker.[4] Both of these rules are objectionable, however, because, judged by ordinary mercantile custom, their presumptions are in the majority of cases contrary to fact. Still a third presumption is that the anomalous indorser is a second indorser,[5] the payee, by necessity being the first. And as this rule fails to protect the payee, the New York court, to effect that desirable result, ekes out the main presumption with a fiction, by which the payee is conclusively presumed to have indorsed without recourse to the anomalous indorser, and the latter to have indorsed back to the payee. In this way his liability is made that of a first indorser.[6] The sole merit of so violent a fiction is that it does afford a means of carrying out the probable intention

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[19] Atkinson *v.* Dowling, 33 S. C. 414.
[20] Gaskins *v.* Finks, 90 Va. 384.
[21] Learned *v.* Tallmadge, 26 Barb. (N. Y.) 443, 451.
[22] 4 KENT, COMMENTARIES, 12 ed., 497.

[1] Steele *v.* McKinlay, 5 App. Cas. 754. See 11 HARV. L. REV. 54.
[2] Jackson *v.* Hudson, 2 Camp. 447.
[3] Draper *v.* Weld, 13 Gray 580. See DANIEL, NEGOTIABLE INSTRUMENTS, § 713 a.
[4] Ewan *v.* Brooks-Waterfield Co., 55 Oh. St. 596, 606. It would be as sensible to presume him a surety for the acceptor; but such a presumption seems not to have been indulged. See Steele *v.* McKinlay, *supra*, 764.
[5] Eilbert *v.* Finkbeiner, 68 Pa. St. 247.
[6] Moore *v.* Cross, 19 N. Y. 227.